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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-1249

MARTIN SKLAROFF and JESSE SKLAROFF
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

The Petitioners, MARTIN SKLAROFF and JESSE SKLAROFF, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 17, 1975.

OPINION BELOW

The opinion rendered in this matter by the United States Court of Appeals for the Fifth Circuit, reported at 506 F.2d 837 (5th Cir. 1975), appears in the Appendix hereto and is designated as Appendix "A".

The petition for rehearing filed by the Petitioners was denied on March 4, 1975. A copy of said denial of the petition for rehearing is attached hereto as Appendix "B". A motion staying the issuance of the mandate was granted on March 18, 1975. Copies of the orders staying the mandate are attached hereto as Appendix "C" and "D". The opinion rendered by the District Court in and for the Southern District of Florida in the case is reported at 323 F.Supp. 296 (S.D. Fla. 1971)*

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on January 17, 1975. A timely petition for rehearing was denied on March 4, 1975, and this petition for certiorari was filed within 30 days of that date. The Court's jurisdiction is invoked, under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

First Amendment to
The Constitution of the United States

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free

*Due to the length of the said opinion, comprising 31 pages, and since it is reported, it is not set forth herein as an Appendix.

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourt Amendment to
The Constitution of the United States

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to
The Constitution of the United States

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

*Title 18, United States Code,
Sections 2516(1) and 2518(1), (4) and (8)(a)

§ 2516(1) Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216

§ 2518(1), (4) and 8(a) Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

*Chapter 119 is set out in its entirety in the Appendix hereto and designated as Appendix "E".

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communications under this sub-section shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218.

QUESTIONS PRESENTED

I

Whether a ruling in direct conflict with that of another Circuit which sanctions the absence of a commencement date on a wiretap order issued pursuant to Title 18, United States Code, Section 2518, violates Title 18, United States Code, Section 2518(4)(e).

II

Whether the Petitioners were denied due process of law and the intent of Congress underlying the promulgation of Chapter 119 was thwarted by the cumulative effect of the numerous violations of Chapter 119 in the wiretap application and order in the case sub-judice.

III

Whether Chapter 119, Wire Interception and Interception of Oral Communications, Title 18, United States Code, Sections 2510-2518, is unconstitutional in violation of the First, Fourth and Fifth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On June 17, 1969, an application was submitted to Judge William O. Mehrtens, District Court Judge for the Southern District of Florida, seeking an order allowing the interception of wire communications of the Petitioners. The application for the order was presented by William G. Earle, an Assistant United States Attorney and was

predicated on an attached authorization from Will Wilson, the Assistant Attorney General in charge of the Criminal Division. The application relied upon and had attached to it an unsworn statement purportedly being an affidavit from an FBI agent. The Court entered its order granting the requested interception for a period of seven days from the date of the order, but did not date the order.

As a result of this wiretap, on the 25th day of March, 1970, the Petitioners were charged by Indictment, along with others, with violations of Title 18, United States Code, Section 1084. They entered pleas of not guilty and filed pre-trial motions, including a Motion to Suppress and Supplemental Motion to Suppress. The cases came on for trial before the Honorable Ted Cabot, District Judge, on May 24, 1971. Petitioners were found guilty by the jury and post trial Motions were heard and denied by the Court. The Petitioners then filed their Notice of Appeal to the Fifth Circuit Court of Appeal.

Also as a result of this wiretap, the Petitioners had been Indicted in the Northern District of Georgia on March 3, 1970, and charged with violations of Title 18, United States Code, Section 371 and 1084. After pre-trial Motions had been filed, including a Motion to Suppress, the case came on for trial before the Honorable Newell Eddenfield, District Judge. The Petitioners were found guilty of certain counts of the Indictment by the jury and, after post trial Motions were denied, they filed their Notice of Appeal. The two above cases were consolidated for purposes of appeal to the Fifth Circuit Court of Appeal and are jointly presented in this petition.

REASONS FOR GRANTING WRIT

I

THAT THE FAILURE OF A TRIAL JUDGE TO DATE A WIRETAP ORDER DIRECTLY VIOLATES TITLE 18, UNITED STATES CODE, SECTION 2518(4)(e) AND THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS HEREIN CONFLICTS WITH AN OPINION ON THE SAME ISSUE RENDERED BY THE SIXTH CIRCUIT COURT OF APPEALS.

The Petitioners submit that the trial court's order authorizing and approving the interception of their wire communications in the instant case was legally insufficient in that the date of the order's entry was omitted. Title 18, United States Code, Section 2518(4) clearly sets forth the mandatory specifications which must be contained in any interception order. By the omission of the date it was issued, the order in the instant case fails to meet the mandatory requirements of Section 2518(4)(e). As a further result of the failure of the order to include the date it was entered, the period of time during which the interception was authorized became vague and ambiguous and thus the order on its face did not meet the specificity requirements of *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967); and *Osborn v. United States*, 385 U.S. 323 (1966).

The portion of the interception order which fails to satisfy the Congressional scheme requiring a specific period of time during which the interception is authorized reads as follows:

"B. Such interception to continue for a period of seven days from the date of this order or until communications shall have been intercepted which reveal the exact manner and extent to which Martin Sklaroff and Jesse Sklaroff receive and give out line information assisting in the placing of bets or wagers on a sporting event or contest, whichever date is earlier.

"PROVIDED THAT, this authorization to intercept wire communications shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications that are otherwise not subject to interceptions under Chapter 119, Title 18, United States Code, and must terminate upon the attainment of the authorized objective or, in any event, at the end of seven days from this date.

"DONE and ORDERED at Miami, Florida this 17th day of ."

"/s/ W. O. MEHRTENS

UNITED STATES DISTRICT JUDGE"

As is evident from the order as set forth above, it authorized interception for a period of seven days from its supposed signing. However, *the order did not contain the month or year it was signed.*

In a wiretap order, the number of days the interception is issued determines the scope of the search and seizure. Thus, since the search and seizure herein (wire

interception) was to begin the day the order was signed and end seven days from that date, the extent and scope of the search herein lacked constitutional particularity.

Title 18, United States Code, Section 2518(4)(e) provides that "*the period of time during which such interception is authorized shall be specified in the order*". This requirement is not merely to instruct the agents when to execute the order, but in fact, determines the scope of the search. "Nothing is to be left to the discretion of the officers executing the order" *Marron v. United States*, 275 U.S. 192 (1927). "[S]earches by eavesdrop must be confined in time precisely as the search for tangibles is confined in space, ..." (*Berger v. New York*, 388 U.S. at 100) (Harlan, dissenting).

It cannot be gainsaid that the provision in the order that the interception of communications must terminate at the end of "seven days' from this "17th day of _____" is without any legal force and effect. Certainly, no Court would not entertain an appeal from a final judgment reciting that it was entered "this *17th* day of_____" or that the judgment shall become final "seven days" from this "*17th* day of _____", for the simple reason that the Court would be unable to ascertain from the judgment or for that matter from a docket entry "*17th* day of _____" when the time begins to run to take the appeal. Notwithstanding, in a matter where government agents are permitted by Court order to intercept wire communications and where such orders must specify the period of time during which such interception is authorized, the Fifth Circuit holds valid, without opinion, an order which does not specify when the time period begins to run.

The position adopted by the Fifth Circuit Court of Appeals herein on this issue is in direct conflict with the Sixth Circuit Court of Appeals. In *United States. Lamonge*, 458 F.2d 197 (6th Cir. 1972), the Sixth Circuit adopted the argument espoused herein by the Petitioners. In *Lamonge, supra,* the Sixth Circuit held that the absence of a date on an interception order makes its duration unlimited by its own terms and thus makes the order invalid on its face. In so ruling, the Sixth Circuit Court of Appeals concluded that the omission of the date that a wiretap order was issued thereby authorizes the wiretap for an unreasonable length of time. This renders the order invalid since it contravenes the mandate of *Berger v. New York, supra.*

Further, the court in *Lamonge, supra,* specifically rejected the position taken by the trial judge herein that the defect could be cured by adding the date of issuance to the order, Nunc Pro Tunc. In rejecting this contention, the court held that "the assertion that the date was added Nunc Pro Tunc did not change the fact that the wiretap authorizations were on their face invalid at the time they were used." (*United States v. Lamonge*, 458 F.2d at 199)

To allow matters dehors the order to supplement a critical and essential deficiency on the face of the order is to permit Federal agents, rather than a District Judge, the right to complete the order in question. Adherence by the Courts to the mandatory requirements of the wire interception statutes will further the cause of justice far more than excusing disobedience of the Congressional scheme, albeit unwitting disobedience.

II

THAT THE PETITIONERS WERE DENIED DUE PROCESS OF LAW AND THE INTENT OF CONGRESS UNDERLYING THE PROMULGATION OF CHAPTER 119 WAS THWARTED BY THE CUMULATIVE EFFECT OF THE NUMEROUS VIOLATIONS OF CHAPTER 119 IN THE WIRETAP APPLICATION AND ORDER IN THE CASE SUBJUDICE.

The Petitioners submit that the totality of prejudice caused by the numerous violations of Chapter 119 in the wiretap application and order herein clearly thwart the Congressional intent that electronic eavesdropping be confined within narrow bounds under strict judicial supervision. *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Bernstein*, ____F.2d____; 16 Cr.L. 2421 (4th Cir. 1975).

A. Interception Order Granted for Telephone Numbers Not Authorized. [Violation of 18 U.S.C. 2516(1) and 2518(1)(b)(ii),(iii)]

The application filed by Mr. William Earle to obtain an order allowing an interception of the communications on the Petitioners' phones, telephone numbers 691-9561 and 691-9797, was not authorized by Will Wilson, Assistant Attorney General in charge of the Criminal Division. Mr. Wilson, in his letter of authorization to Mr. Earle, authorized Mr. Earle to apply for an interception order on four telephones carrying the following numbers: 691-9981, 691-9528, *691-9566* and *961-9797*.

The application Mr. Earle filed requested an order to intercept communications from telephones carrying the numbers *691-9561* and *691-9797*. The application requesting the interception for these particular numbers was without any authorization from Will Wilson and thus, the order to intercept communications on these said numbers was improper as a matter of law in that it violated the provisions of Title 18 United States Code, Section 2516(1) and Section 2518(1)(b)(ii), (iii).

The Petitioners submit that since there existed no authorization by Assistant Attorney General Wilson for the application to intercept the telephone numbers 691-9561 and 691-9797 the communications from those facilities and evidence derived therefrom should have been suppressed by the trial court.

B. Application Defective — No Sworn Affidavit [Violation of 18 U.S.C. 2518(1)]

The application filed by William Earle upon which the order of interception in the instant case was predicated was defective as a matter of law since it relied on an unsworn statement to establish probable cause.

It is clear that the so-called affidavit and supporting documents submitted by the Assistant United States Attorney along with the application, and which were relied upon by the Court in reaching the findings for its order, were not supported by oath or affirmation as required by the Fourth Amendment to the Constitution of the United States and the provisions of Title 18, United States Code, Section 2518(1). The Petitioners submit that when entering the order in the instant case, the Court acted merely

as a rubber stamp for the Justice Department when it is considered that the affidavit was unsworn. "The constitutional requirement that no search warrants 'shall issue but upon probable cause supported by Oath or affirmation' is not to be cavalierly brushed aside as an empty formality." *Dow v. Baird*, 389 F.2d 882, 884 (10th Cir. 1968).

Since the "affidavit" submitted by Agent Sharp was the entire documentation upon which probable cause was found by the Court, the fact that it was not sworn to is of paramount importance and cannot be disregarded as a meaningless technicality.

C. Fourteen Days Delay in Delivery of Intercepted Conversations [Violation of 18 U.S.C. 2518(8)(a)]

Title 18, United States Code, Section 2518(8)(a) provides that "*immediately upon the termination of the interception, the recordings must be made available to the Judge who issued the order and sealed.*" (See Senate Report 104) In the instant case the recordings, the order of authorization, the application, Sharp's statement and the supporting documents were not made available to the Court until July 8, 1969, fourteen days after the interceptions had terminated.

The procedure required by Chapter 119 is an attempt to safeguard the identity, physical integrity and contents of the recordings to assure their admissibility in evidence as mandated by *Berger v. New York*, 388 U.S. 41, at page 60 (1967).

Although the Senate Report mentions the power of the Judge to enforce the provisions relating to return by the contempt power of the Court, it is submitted we will see the same kind of enforcement here that we saw when agents of the Federal Bureau of Investigation and Internal Revenue Service conducted illegal searches and wire tapping prior to the enactment of Chapter 119. No government agent has ever been prosecuted for a violation of Title 47, U.S.C. Section 605, and we submit that none will ever be held in contempt for not properly making a return. The only way to enforce the return requirements contained in Chapter 119 is to suppress the contents of the communications, thereby establishing an exclusionary rule which will force the government to follow the dictates of Chapter 119.

D. Guidelines Needed Now

The Petitioners submit that the procedural errors and violations of Chapter 119 reflected herein will be repeated time and time again by the law enforcement agencies using the eavesdropping provisions of Chapter 119. It is imperative that this Honorable Court set forth guidelines now as to the procedure to be followed since the same provisions of Chapter 119 which are in contention here will be frequently used in the future by law enforcement agencies and subjected to judicial scrutiny.

III

THAT CHAPTER 119, WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS, TITLE 18, UNITED STATES CODE, SECTIONS 2510-2518, IS UNCONSTITUTIONAL IN VIOLATION OF THE FIRST, FOURTH and FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Fourth Amendment Violations

1. Continuous Intrusion

Under the principles announced by the Supreme Court in *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967), and *Osborn v. United States*, 385 U.S. 323 (1966) Chapter 119 is clearly constitutionally unsound with respect to the duration of the eavesdropping authorized thereunder.

Chapter 119 authorizes eavesdropping for potentially unlimited periods of time. Section 2518(5) of Chapter 119 permits eavesdropping for an initial period of 30 days with an unlimited number of 30 day extensions on renewed showings of probable cause. The allowance under 2518(5) of such lengthy surveillance, possibly for years, conflicts sharply with *Berger's* clear disapproval of the two months authorization permitted by the New York Statute.

The thirty day time limit in Chapter 119 clearly is too broad, continuous and unrestrictive. Since in *Berger*, a two month period was too great on its face because "it is the equivalent of a series of intrusions, searches and

seizures, pursuant to a single showing of probable cause" (388 U. S. at 59), what characteristics of a one month limitation are there that removes this danger? The Petitioners submit there are none and that the constitutional defects inherent in the 60 day period remain in the 30 day period.

Moreover, Section 2518(1)(d) and (4)(e) of Chapter 119 do not limit the eavesdropping to specific points in time, unlike the court orders upheld in *Katz* and cases approvingly cited in *Berger* (388 U.S. at 63), but rather allow uninterrupted eavesdropping over a "period of time". Under these provisions, the Government may install a tap or a "bug" which will be in *continuous* operation throughout the days or months for which the interception is authorized. (Whether the Agents intercept for the full 24 hours or for lesser periods is immaterial to a determination of the constitutionality of the statute on its *face.*)

This authorization for continuous operation of the tap or bug is in direct contradiction to the Supreme Court's holding in *Berger*, which disapproved the uninterrupted interception as allowing "indiscriminate" seizure, and which approved the *Osborn* interception because "the order authorized one limited intrusion rather than . . . continuous surveillance . . ." (388 U.S. at 57). See also *The Supreme Court*, 1967 Term, 82 Harvard Law Review 63, 195-196 (1968). Professor Robert G. Blakey of Notre Dame Law School, the principal draftsman of the bill and of the ABA Standards Relating to Electronic Eavesdropping interprets *Katz* as allowing authorization for interception of a "single phone call." Tentative Draft, *ABA Standards Relating to Electronic Surveillance*, page 148 (June 1968). Chapter 119 however allows a "Roving Com-

mission" to seize any and all conversations. Swartz, 67 Mich. L. Rev. 455, 458, 459 (Jan. 1969).

There can be no question when the *Berger* and *Katz* opinions are read together, that this Honorable Court intended to set out in them an absolute Fourth Amendment protection for "what [a person] seeks to preserve as private" (389 U.S. at 351) and an absolute proscription of "general warrants" which leave "too much to the discretion of the officer executing the order" (388 U.S. at 59). See *Entick v. Carrington*, 19 How. St. Trials 1039 (1765); *Boyd v. United States*, 116 U.S. 616 (1886); *Harris v. United States*, 331 U.S. 145, 157, 158 (1947). "The provenance of the Fourth Amendment bears on its scope." (Frankfurter dissent) See generally Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937). Despite the requirements of the application procedure as set forth in Section 2518, Chapter 119, on its face still permits unrestricted wire tapping or eavesdropping for 30 days, renewable, in effect, by mere presentation of the prior "probable cause". By not binding state and federal officers to the concepts of "automatic termination when the described communication has been first obtained" (see Chapter 119, Section 2518 (1) (d) and (4) (e) and "one limited intrusion" (388 U.S. at 57), Chapter 119 *creates the very evil found in the New York Statute in Berger*, in that:

> "During such long and continuous (24 hours a day) periods, the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection to the crime under investigation." 388 U.S. at 59

Nor does the language required to be placed in the Judge's order that the authorized interceptions "shall be executed as soon as practicable" (Section 2518(5), or even the remedy of suppression, (2518)(10)(a), really offer adequate assurance that the government will not overhear enumerable conversations to which they have no business or right. The executing officers must listen to all calls at least in part to determine if they relate to the authorized objective in the order.

The possibility of a warrant authorizing a number of interceptions under Chapter 119 squarely conflicts with *Berger*. In *Berger*, the court seemed to require that each order be limited to one interception; in disapproving a "series of intrusions, searches and seizures, pursuant to a single showing of probable cause" (388 U.S. at 59). The *Berger* court's implied approval of *Osborn*, where the FBI had obtained a new order for a second interception made only a day after the original interception, reinforces this interpretation of *Berger*. Further, even the "narrowly circumscribed" surveillance over a period of days that was approved in *Katz*, is a far cry from the continuous series of intrusions, possibly lasting for years, authorized by Chapter 119.

2. Lack of Particularity

As stated by Justice Clark in his opinion in *Berger*, the inherent obtrusiveness of eavesdropping makes "the need for particularity especially great". *Berger v. New York*, 388 U.S. at 56 (1967). (Impliedly approving *Stanford v. Texas*, 379 U.S. 476, 485 (1965) requiring a scrupulous exactitude in the warrant where confiscation of books was concerned because of the First Amendment implications of such seizure.)

In view of the possibility of the long term eavesdropping authorized by Chapter 119, *Berger's* requirement that the "property sought", i.e., the conversation, be described with particularity in the warrant becomes all the more important. The need for particularity which was lacking in the statute and the warrants that were condemned in *Berger* had previously been emphasized by the Supreme Court in *Osborn v. United States*, where it was found that the type of conversation was so described with particularity, that "the officers could not search unauthorized areas."

The Supreme Court's subsequent decision in *Katz* underscored its concern for particularity by approving, in dictum, an extremely narrow intrusion. The Fourth Amendment's particularity requirements, as stressed by this Court in its previous decisions, is contravened by the provisions of Chapter 119. A strict particularity requirement would exclude two types on non-specified evidence: undescribed evidence of the crime being investigated, *(Marron v. United States*, 275 U.S. 192, 196 (1927), and evidence of other crimes, *(Seymour v. United States*, 369 F.2d 825 (10th Cir., 1966). Chapter 119 does not exclude either kind of evidence.

As to the non-specified evidence of a specified crime, Sections 2518 (4) (c) and (e) require a description of the "*type of communication sought to be intercepted.*"

In view of the concern of this Court with particularity of description in the warrant, "type of communication,,' must be construed narrowly. Justice Clark's statement that the "need for particularity is especially great in the case of eavesdropping" may be explained by his citations there-

after of *Osborn*, *Goldman*, *Lopez* and *On Lee*, as examples of specificity, for, as the description in the accompanying footnote denotes, all four cases involve quite detailed advance knowledge and descriptions of the anticipated contents of the conversation of the crime and persons involved, and of the places and time of interception. *Katz* also reflects a meticulous construction of the particularity requirement.

Even reading Chapter 119 narrowly, the statute still violates the particularity requirement of the Fourth Amendment in that it still allows the police to listen for all conversations that fit the description of the type specified in the order. This certainly seems to be less than the kind of particularity that is impliedly required by *Berger* and *Katz*. Moreover, Chapter 119 seems to allow the interception of conversations about non-specified offenses. Section 2517 (5) expressly permits retroactive judicial ratification of the seizure of evidence of other offenses if the evidence was obtained by a legal interception. This provision completely and totally ignores the holding of the Supreme Court in *Marron* prohibiting "seizure of one thing under a warrant describing another" (275 U.S. at 196). Were the *Marron* limitations to be ignored, all searches and seizures would verge on the general, so long as the initial entry was legitimate there would be no reason to stop the search even after the described items had been seized, since everything else that was found could be used in a subsequent prosecution. (*Warden v. Hayden*, 387 U.S. 294 (1967), is not in opposite since the "mere evidence" seized there was not testimonial).

The findings required by subparagraph (3) of 2518 do not require a judge to find based on the facts stated

in the application that a certain number of days or hours is needed to obtain the authorized objective of the interception. Thus the court does not determine the scope of the search. This violates *Berger*, *Katz* and *Osborn*, and the Fourth Amendment to the United States Constitution. In *Osborn v. United States*, 385 U.S. 323 (1966), there was a specific finding that there was probable cause for coverage of one meeting. When the recording equipment failed a new finding of probable cause was required before a new order was issued. Chapter 119 requires the applicant to state the period of time during which the interceptions are to be made but nowhere therein is there to be a finding by the Court based upon facts in the application as to the duration of the interception.

Paragraph (5) of Section 2518 does state that the order may not authorize an interception for any period longer than is necessary to achieve the objective of the authorization. This, however, under present procedure, can only be determined *after* the interceptions have terminated. Therefore "the deliberate impartial judgment of a judicial officer . . . (is not) imposed between the citizen and the police . . ." *Katz v. United States*, 389 U.S. 347, 357 (1967). The most important finding, the proper scope of the search, is not determined until the interception has been terminated. Nor is judicial supervision of the interception mandatory. Without such supervision the executing officers decide when to stop the interception. Thus the scope of the search is determined by the officers conducting it, contrary to the dictates of *Berger*, *Katz*, *Osborn*, and *Marron*, *supra*.

The lack of the requirement for particularity in the warrant authorizing the eavesdropping or wire tapping

pursuant to Chapter 119 is constitutionally fatal to the said law. Instead of the more meticulous particularity for electronic eavesdropping that is unquestionably required by *Berger*, Chapter 119 contains less particularity than is usually imposed to secure the conventional search warrant.

B. Fourth and Fifth Amendments — Testimonial Evidence

Although *Warden v. Hayden*, 387 U.S. 294 (1967), abrogated the distinction between mere evidence and instrumentalities, fruits of crime, or contraband, the conceptual change of the Fourth Amendment therein contained in no way affected the prohibition in the Fourth and Fifth Amendments for a search for evidence that is solely "testimonial" or "communicative" in nature. As stated by Justice Brennan in his majority opinion for the Court:

> "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California*, 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826. *This case does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.*"

As stated by Justice Douglas in his dissent in *Warden v. Hayden, supra*, "that which is taken from a person

without his consent and *used as testimonial evidence* violates the Fifth Amendment." (387 U.S. at 320).

Since the repudiation of the mere evidence rule in *Hayden* only affected *non-testimonial evidence*, all of the prior case law rejecting the use of *testimonial evidence* seized by way of a search warrant reflects the law that this Court must follow. The allowance of the seizure of testimonial evidence by Chapter 119 is clearly in violation of this law.

A search warrant cannot be used solely to gather testimonial evidence. "In this regard the Fourth and Fifth Amendments run almost into each other." *Boyd v. United States*, 116 U.S. 616, 630 (1886); *Gouled v. United States*, 255 U.S. 298 (1921).

This rule of law presents specific problems for the orders allowing the interception of wire or oral communications as set forth in Chapter 119. The interception of such communications is authorized by Section 2516, Chapter 119, "when such interception may provide or has provided evidence of" certain enumerated crimes.

Through prior understandings of earlier decisions relating to the exclusion of mere evidence from material permissibly seizable have recently been refined by the Supreme Court, *Schmerber v. California*, 383 U.S. 757 (1966); *Warden v. Hayden*, 387 U.S. 294 (1967), the Fifth Amendment privilege still applies to wiretaps taken in accordance with Chapter 119. As was said in *Schmerber*, the privilege protects an accused from providing the State (or Government) "*with evidence of a testimonial or communicative kind.*" (384 U.S. at 761). Thus, even if

the Fifth Amendment does not bar the seizure of clothing or blood, as in *Hayden* and *Schmerber*, it bars the seizure of conversations as much as it bars the seizure of private papers.

The real aim of the *Boyd-Gouled* doctrine preventing searches for "mere evidence" is the search itself. "[L]imitations upon the fruit to be gathered tend to limit the quest itself", said Judge Learned Hand in *United States v. Poller*, 43 F.2d 911, 914, (2nd Cir., 1930). Eavesdropping or wiretapping is necessarily an all-encompassing search. The words the police wish to hear may be said in the bedroom or bath, office or elevator, at noon or midnight, or by anone who happens to use the particular phone. Even if the State is entitled to those words, however, "They cannot be reached, except by a thorough search of all that the offender has [or says], to allow which would be to countenance exactly what the [Fourth] Amendment was designed to prevent." *United States v. Kirschenblatt*, 16 F.2d, 202, 204 (2nd Cir., 1926). Learned Hand, J.).

In *Gouled v. United States, supra*, at 304, the Supreme Court observed that the Fourth and Fifth Amendments:

> "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of court or by well-intentioned but mistakenly over-zealous executive officers."

Once the Fourth and Fifth Amendments apply, it follows that the statements overheard, which are of a testimonial and communicative nature and which are seized solely for their evidentiary value, cannot be used in evidence against a defendant in that they contravene the constitutional guarantee of the said amendments.

C. First Amendment Violations

The First Amendment to the Constitution of the United States declares that "Congress shall make no law . . . abridging the freedom of speech." This applies equally to the States. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). No constitutional right has suffered more frequent attack by governmental officials than the right of free speech; and in no other area has the Supreme Court of the United States so consistently turned back these attacks.

The dimensions of free speech, the most basic of our freedoms, have not been fully kenned, however. As is often the case, the nature and quality of a freedom are not understood until that freedom is endangered. Individual freedom of expression is not mere political debate. It is not limited to the public forum. First Amendment freedoms are not confined to those which fit a literal category of speech, petition or assembly. *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Bridges v. California*, 314 U.S. 252, 269 (1941). The First Amendment creates "penumbral" freedoms of association, communication and individuality, *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958); *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557 (1963), and a "zone of

privacy" which gives that freedom "life and substance". *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Freedom of speech includes the freedom to hold oneself apart from the public scene and speak freely while speaking privately—to withdraw to a private place (one's own or another's) where the individual can ease the lines of his public face and posture, and without fear that he is being watched:

> ". . . open his collar . . . and give vent to his own particular daydreams, his mutterings and snatches of crazy song, his bursts of obscenity and afflatus of glory." Cahn, *The Sense of Injustice*, 151 (1949).

" 'Privacy' is not merely a personal predilection; it is an important functional requirement for the effective operation of social structure." Merton, *Social Theory and Social Structure*, 375 (1957); see also pp. 343-346.

A secretly installed microphone or a wiretap necessarily deprives those within its range of this freedom.

Chapter 119 purports to authorize such secret interception of wire or oral communications, upon issuance of a Court order, if the court finds certain matters from the application. (See 18 U.S.C. 2518(a) thru (d)) This statute in view of such allowance, clearly imposes a certain restraint on free speech.

In *On Lee v. United States*, 343 U.S. 747 (1952); *Lopez v. United States*, 373 U.S. 427, 439 (1963); *Hoffa v. United States*, 385 U.S. 293 (1966); and *Osborn v.*

United States, 385 U.S. 323 (1966), the Supreme Court of the United States held that the police might obtain recordings of statements by use of a microphone hidden on the person of one whom the defendant knew was present. This Honorable Court was not presented with First Amendment arguments in those cases. Whether upon reconsideration in First Amendment terms these cases would be decided differently is not necessary to now determine. In those cases the persons whose statements were recorded knew of the presence of the person who carried the listening or recording apparatus. Even if those who speak must assume the risk, under the *On Lee-Osborn* line of cases, that the person in whose presence they speak may divulge what is said to them, it does not follow that they must also risk that others, to whom they have not knowingly spoken, by secret listening devices will also have heard what is said. The method of eavesdropping authorized by Chapter 119 creates for every person everywhere the possibility that his statements are being listened to, no matter how faithfully those to whom he speaks keep his confidences. This tears at the very fabric of human relationships; the selection of those to whom one will communicate.

In a broad sense the statute in question has a legitimate end: to assist law enforcement officers in the prevention of crime, and to bring to the bar of justice and punish those who engage in criminal conduct. Legitimate ends alone, however, will not justify legislation which impinges on the full exercise of the right of free speech. *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940).

Section 2518 of Chapter 119 purports to authorize this impingement on free speech anytime the judge to

whom application is made finds "probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in Section 2516 of this chapter." This impingement on free speech is not restricted to situations concerning grave and immediate danger which is authorized by Chapter 119, Section 2518, subsection 7(a) and (b), or situations concerning the national security, Chapter 119, Section 2510, subsection 3. As was said in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943), "[F]reedoms of speech [and other First Amendment freedoms] . . . are susceptible of restriction only to prevent *grave and immediate* danger to interests which the State may lawfully protect." (Emphasis added).

Some might contend that any crime creates a "grave and immediate" danger to the public interest, thereby permitting the restraint of free speech that eavesdropping represents upon such a showing. This, however, ignores two vital points. First, restraining free speech, through eavesdropping or any other means, is permissible, if at all, only when there is a likelihood that a crime of great seriousness such as kidnapping, murder or matters affecting the national security, is involved. In the words of the Supreme Court in *Thomas v. Collins*, 323 U.S. 516, 530 (1945):

> "[W]hatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in *public danger*, actual or impending. *Only the gravest abuses*, endangering paramount interests, give occasion for permissible limitations." (emphasis added)

This statute would permit eavesdropping in situations without any such grave danger by authorizing applications for interception for virtually every federal or state offense. See Section 2516. Almost any crime will do. Second, the statute does not authorize eavesdropping to assuage a grave danger or prevent any crime at all. It merely seeks to authorize eavesdropping to gather evidence of crime. This is a total failure to provide a sufficient basis for trenching upon the Constitutional rights of citizens of the United States.

Undoubtedly, statutes can be drafted which, by the enumeration of purposes sufficiently related to vital public interests, and by the incorporation of the appropriate procedural safeguards of the Fourth Amendment and limitations on the use of the conversations overheard (e.g., see *Massiah v. United States*, 377 U.S. 201, 207 (1964)), can withstand the tests of the First, Fourth, and Fifth Amendments.[1]

The modern developments in electronic eavesdropping are well known. Any telephone can be quickly transformed

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[1]On February 6, 1967, former President Johnson, in his message to the Congress on crime, recommended enactment of legislation which would

> "outlaw all wiretapping, public and private, wherever and whenever it occurs, as well as all willful invasions of privacy by electronic devices such as radio transmitters and concealed microphones. *The only exceptions would cover those instances where the security of the Nation itself is at stake—and then only under the strictest safeguards.*" (H.R. Doc. No. 53, 113 Cong.R., H. 985, 989; S. 1517, 1520 (daily ed. Feb. 6, 1967).) (Emphasis added).

Legislation of the kind proposed by the former President would comport with the requirements of the First Amendment which are urged here.

into a microphone which transmits every sound in the room—even when the receiver is on the hook. Tiny microphones can be secreted behind, or even in, a picture, with a transmitter buried in the frame.

When such eavesdropping is systematically engaged in by the police it has special impact upon free discussion. Since Orwell's *1984*, men have feared the totalitarian impact of unremitting official invasion of privacy, which, it can be expected, will always be supported by arguments of necessity. For the historical example of Nazi Germany, see Shirer, *The Rise and Fall of the Third Reich*, 273 (1960). Official eavesdropping places the spectre of the government agent at the right hand of every individual everywhere—for there is no way of knowing when a conversation is being overheard. All who express their quiet aspirations, dreams, hopes, plans, foibles of personality—and conspiracies—risk that these are being shared with officials unknown to them or to their confidants.

The indiscriminate intrusiveness of a "bug" that can catch every intimate, irrelevant or privileged utterance of each person in the room or area bugged; or the inevitable equivalent results of a continuous tap on a telephone which picks up all conversations of everyone who talks on the line whether the subject calls out from the tapped number, into that number, or is called by someone using that phone, most severely restricts the constitutional rights of free speech of American citizens. Because these devices intrude so deeply and so grossly, they clearly must have the effect of discouraging people from speaking freely. As Justice Brennan has warned, if these devices proliferate widely, we may find ourselves in a society where

the only sure way to guard one's privacy "is to keep one's mouth shut on all occasions." *Lopez v. United States*, 373 U.S. 427, 450 (1963). See also Kalven, *Privacy in the Year 2000* in *Symposium, Toward the Year 2000: Work in Progress*, Daedalus 876, 882 (1967).

To disregard the chilling effect these new electronic eavesdrop "weapons in the war on crime" have on innocent people is to allow free speech to become a casualty of that "war". It would avail society nothing if in an attempt to secure our citizens from crime we took from them the security of private free speech.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of April, 1975, a copy of the above Petition for Writ of Certiorari, was mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. and to Martin Steinberg. United States Department of Justice, 111 N.W. 5 Street, Miami, Florida.

I FURTHER CERTIFY that all parties required to be served have been served.

ALAN E. WEINSTEIN